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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CORVONTE MICA TAYLOR, Defendant and Appellant.	D074197 (Super. Ct. No. RIF1506402)

APPEAL from a judgment of the Superior Court of Riverside County, Ronald L. Taylor, Judge. Judgment on offenses affirmed, sentence vacated and remanded with directions.

Marta L. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Corvonte Mica Taylor was convicted of two counts of possession of controlled substances for sale (Health & Saf. Code, §§ 11351 (hydrocodone) & 11375, subd. (b)(1) (alprazolam)); one count of possession of marijuana for sale (Health & Saf. Code, § 11359, subd. (b)); with true findings that all three drug-sale charges were for the benefit of or in association with a gang (Pen. Code,[1] § 186.22, subds. (b)(1)(A), (d)[2]); and one count of participating in felonious gang conduct (§ 186.22, subd. (a)). He claims insufficient evidence he possessed controlled substances for sale, insufficient evidence of the substantive gang offense and of the gang allegations, erroneous admission of a gang rap video, error in denying a motion to suppress evidence obtained from a cell phone search, ineffective assistance of counsel for failing to move to suppress evidence of his cell phone text messages, and sentencing errors. We conclude there was no prejudicial error in the criminal convictions, but there were errors in sentencing. We vacate the sentence and remand for resentencing. In other respects, we affirm the judgment.

BACKGROUND

Prosecution Case

On August 18, 2015, Riverside Sheriff's Investigator Steven Leone stopped a car occupied by Myron B., a known Perris Loc Crips (P-Loc) gang member. Investigator Leone arrested him on an outstanding felony arrest warrant. The car was in a high-crime

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1 Further statutory references are to the Penal Code unless otherwise specified.

2 Subdivision (d) was alleged in connection with count 3, marijuana sales. Count 3 was filed as a felony but was reduced to a misdemeanor before trial due to the passage of Proposition 64. With the gang allegation, however, the crime became a wobbler, punishable as a felony or as a misdemeanor. (§ 186.22, subdivision (d).)

area known for activity by the Edgemont Criminals and Edgemont Locos gangs. Taylor was driving the car, which was a rental. Kevon H. was a passenger. When Taylor opened his door to get out of the car, Investigator Leone saw a pill bottle protruding from a seam on the driver's side near the center console of the car. The bottle contained 42 alprazolam (Xanax) pills and had the name of Leticia D. on the label. Investigator Leone discovered that Taylor was on probation for narcotic sales and had waived his Fourth Amendment rights. He searched the car and found another pill bottle containing hydrocodone pills in the center console, accessible to the driver. The pharmacy label was in the name of Gwendolyn A. It said the bottle contained 120 pills, but there were 156 pills inside. Hydrocodone and alprazolam are among the most common pharmaceuticals sold unlawfully.

Taylor said he had a prescription for medication. The officer found a prescription in Taylor's backpack, but the telephone number of the provider was disconnected. The backpack also contained four packages of marijuana totaling about six ounces, $250 in cash, and a recently expired medical marijuana recommendation for Taylor. Taylor had $1,300 in cash and a cell phone on his person. Taylor's cell phone contained an incoming text message requesting some pills and a response about multiple pills being available and the cost for each. Taylor told Investigator Leone that the backpack with marijuana was his. He said the pills belonged to his relatives. He admitted possession of marijuana for sale but denied possession and sale of the pills.

Investigator Leone opined that Taylor was selling marijuana based on the weight and packaging of the marijuana, the amount of cash Taylor had — over $1,500 — and his

admissions. He opined the pills were possessed for sale, based on the totality of the circumstances including the number and type of pills, the large amount of cash, the concealment of the pills and the text messages. Riverside Sheriff's Deputy Jason Gore also opined that Taylor possessed the drugs for sale, based on the totality of the circumstances: the type and quantity of pills, quantity of money, packaging, admissions, text messages, and other factors identified by Investigator Leone.

A gang detective at the police station recognized Taylor, Myron, and Kevon as members of P-Loc. Investigator Leone confirmed that the three men were documented members of that gang. He testified that, based on his experience, street gangs commonly sold drugs in order to obtain money for the gang, and that gang members may travel together for safety when out selling drugs because they have lots of cash and drugs in their possession.

The People presented additional evidence from Deputy Gore, a gang expert, that Taylor, Myron, and Kevon were members of P-Loc, that P-Loc was a criminal street gang, and that Taylor committed the possession-for-sale crimes for the benefit of or in association with the gang. Deputy Gore had extensive personal experience with P-Loc and had personally talked with Taylor and other gang members. Taylor identified himself as a member of P-Loc since 2007, when he was 15.[3] As early as 2008, when he

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3 Taylor agreed to waive his right to have all the officers personally testify to their contacts with gang members under *People v. Sanchez* (2016) 63 Cal.4th 665 and stipulated that Deputy Gore could discuss the contents of field identification cards prepared by other officers.

was 16, Taylor had a gang tattoo indicating that he was in the "frontline clique," the highest level of P-Loc. The officer described numerous law enforcement contacts with P-Loc members, including Taylor in the company of other P-Loc members. Deputy Gore identified common signs and symbols of P-Loc and three predicate crimes committed by gang members, including Taylor's prior sales of controlled substances with other P-Loc members. The gang committed murders, assaults with deadly weapons, witness intimidation, weapons possession, and drug sales.

Deputy Gore explained "gangs travel to meet where the money is at." He said a gang benefits by spreading its drug sales to larger territories and thus expanding its territory. Gang members also want to avoid places where they are known by the police. Based on the evidence and his experience, Deputy Gore opined that Taylor was an active gang member at the time of the crime and possessed the drugs for sale for the benefit of, and in association with, the P-Loc criminal street gang. The money earned by drug sales in expanded territory would benefit the gang, allowing the gang to buy weapons or more narcotics to sell. Committing the crime together with other P-Loc members strengthened the bonds of the gang and gave protection to the drug seller.

Prior Act

Murietta Police Officer Sandra Valle testified about Taylor's prior act of selling prescription drugs. In 2013, Taylor, Myron, Kevon, and other P-Loc gang members were detained after trying to fill a fraudulent prescription. Taylor had two fraudulent prescriptions, a bag of hydrocodone pills in his pocket and another bag of hydrocodone pills in his sock. A loaded semiautomatic firearm and fraudulent prescription pads were

in the car. Each of the four men had several hundred dollars in cash. Deputy Gore opined that Taylor committed this prior crime in association with several gang members and for the benefit of the gang. There, the gang members pleaded guilty to possession of controlled substances for sales, with gang enhancements.

Defense Case

Gwendolyn A. testified that she was Taylor's mother-in-law and Leticia D. was her daughter-in-law. Gwendolyn testified that the hydrocodone pills were hers, prescribed for her chronic back and hip pain. She had rented the car and drove to Las Vegas with Leticia D., Taylor and others. After they returned to Riverside County, Gwendolyn A. left her prescription hydrocodone pills in the car. Taylor drove off in the car before she could retrieve her pills.

DISCUSSION

1. *Substantial Evidence Supports the Jury's Findings*

Taylor contends there was insufficient evidence to support his two convictions for possession of prescription drugs for sale (counts 1 & 2), his conviction for active participation in criminal activity with the gang (count 4), and the three gang enhancements. We conclude that substantial evidence supports the jury's finding of guilt on all these charges and enhancements.

a. *Standard of Review*

We apply a well-settled standard to each of these claims. "[W]e must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime . . . beyond a

reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence — that is, evidence that is reasonable, credible, and of solid value — supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 638–639 (*Jennings*); *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.)

b. *Possession of Controlled Substances for Sale*

To prove possession for sale of alprazolam and hydrocodone, the People had the burden of proving actual or constructive possession of the substances in an amount sufficient to be used for sale or consumption, with knowledge of the presence and nature of the substances, and with the specific intent to sell. (*People v. Mooring* (2017) 15 Cal.App.5th 928, 943 (*Mooring*); *People v. Busch* (2010) 187 Cal.App.4th 150, 161 (*Busch*).) " 'Actual or constructive possession is the right to exercise dominion and control over the contraband or the right to exercise dominion and control over the place where it is found.' " (*Busch*, at p. 161.) Possession need not be exclusive. The defendant may share possession of the substance or dominion and control over the place where the

contraband is located. (*Ibid*.) The inference of dominion and control is easily established when the contraband is discovered in the defendant's car. (*Id*. at p. 162.)

The finding of possession is rationally supported by the facts that Taylor had control over the car and the pills were easily accessible to him. (*Busch*, *supra*, 187 Cal.App.4th at p. 162.) In addition, the quantity was more than sufficient for sale. Taylor knew the pills were present and they were labelled correctly. Gwendolyn A. testified that the hydrocodone belonged to her, but the jury found her not credible. We accept the credibility determination of the jury. (*Jennings*, *supra*, 50 Cal.4th at pp. 638–639.) In any event, possession is not defeated even if the pills were prescribed to others. (*Mooring*, *supra*, 15 Cal.App.5th at p. 945.) This evidence was sufficient for a reasonable trier of fact to find that Taylor possessed the pills, with knowledge of their presence and nature of the substances, in a quantity sufficient for use or sales. (*Id*. at p. 943.)

The finding of intent to sell can be shown by the opinion of an expert or an experienced officer. (*People v. Dowl* (2013) 57 Cal.4th 1079, 1089–1090.) The officers described facts supporting their opinions that Taylor intended to sell the pills.

Hydrocodone and alprazolam are commonly sold unlawfully; Taylor had nearly 200 pills; the alprazolam was partially hidden near the driver's seat; and he had $1,300 on his person and another $250 in his backpack. His knowledge, intent, and motive were further shown by his prior conviction for selling controlled substances. These facts were sufficient for reasonable jurors to infer that Taylor possessed the prescription drugs for sale, even without an expert opinion.

c. *Substantive Gang Participation Crime*

Sufficient evidence also supports the jury's finding that Taylor actively participated in criminal conduct by a street gang (§ 186.22, subd. (a), count 4).[4] The elements of this crime are: "(1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 56

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4 Section 186.22, subdivision (a) provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." It is not necessary to prove that the defendant is a member of a street gang or that he devotes a substantial amount of time to the gang. (§ 186.22, subd. (i).)

(*Albillar*); *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*).) The crime also requires that the defendant act with gang members, not alone. (*Rodriguez,* at p. 1132; *People v. Rios* (2013) 222 Cal.App.4th 542, 560.) The felonious conduct, however, need not be gang related. (*Albillar,* at p. 56.)

Taylor's possession of drugs for sale, in the company of two fellow gang members, fulfilled the requirement of active participation in felonious criminal conduct by members of the gang. Taylor, Kevon, and Myron were all frequently documented, self-admitted members of P-Loc. Taylor had committed the crime of trying to fill a fraudulent prescription with Myron and other P-Loc gang members in 2013, and he admitted he committed that crime for the benefit of, in association with, or at the direction of a criminal street gang. He had been a "frontline," or upper echelon member of P-Loc since 2008, "doing the work" — committing crimes — for the gang. Taylor advertised this status by the tattoos on his body. Given this evidence, the jury could reasonably infer that Taylor, as a frontline member, knew that P-Loc members engaged in criminal activity. The evidence of the admitted gang members working together in another gang's territory, committing a crime that benefitted the gang by bringing in money and spreading market share, was sufficient to show that Taylor participated in felonious criminal conduct by gang members, even though in this instance there was no evidence of gang signs, symbols or clothing. A reasonable jury could also infer that gang members engaged in felonious conduct did not want to draw unfavorable attention to themselves. Substantial evidence supports the jury's finding that Taylor actively participated in a

criminal street gang, with knowledge of crimes committed by members of that gang, and willfully committed felonious criminal conduct with members of that gang.

d. *Gang Enhancements*

The evidence described above also substantially supports the jury's finding that Taylor possessed hydrocodone, alprazolam, and marijuana for sale, in association with, for the benefit of, or at the direction of a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members.[5] The elements to be proved for the gang enhancement are that the defendant committed a crime that was (1) for the benefit of, at the direction of, or in association with any criminal street gang; and (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*Rios*, *supra*, 222 Cal.App.4th at p. 561; *Albillar*, *supra*, 51 Cal.4th at pp. 59–60.) Specific intent " 'is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.' [Citation.]" (*Rios*, at pp. 567–568.)

The first prong was met by Taylor's possession for sales while in the company of two other P-Loc members, Myron and Kevon. "Committing a crime in concert with known gang members can be substantial evidence that the crime was committed in

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[5] Section 186.22, subdivision (b), the gang-enhancement statute, provides in part: "[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows . . . ." Subdivision (d) is similar but applies to crimes that can be punished either as a felony or as a misdemeanor.

'association' with a gang," and substantial evidence supporting an inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1367; *Albillar, supra,* 51 Cal.4th at p. 68.) Further, Deputy Gore testified that drug sales were a common criminal activity by P-Loc members, that drug sales benefit a gang by raising money to buy guns and more controlled substances to sell, that gangs expand their territory and power by selling in new areas outside their traditional territory, and that joint criminal activity strengthened the bonds of the gang as well as providing protection to the perpetrator. The jury could reasonably rely on the officer's experience and knowledge in determining that Taylor acted with the specific intent to promote, further or assist criminal conduct by P-Loc. (*Albillar, supra,* 51 Cal.4th at p. 63; accord, *People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

The expert's opinion was not the only evidence supporting the jury's finding. The facts of the case — riding in a car with two P-Loc members in non-P-Loc territory, selling drugs — supported the findings that Taylor acted in association with gang members with the intent of furthering and assisting criminal conduct by the gang for each of the three sales offenses.

Taylor argues that he could have been committing the crime for his own personal benefit, and not to benefit the gang. The presence of Kevon and Myron diminished the likelihood of such a finding. The jury could reasonably infer that Kevon and Myron expected some benefit to the gang in return for accompanying Taylor and providing protection for him. Several of the cases cited by Taylor are inapposite because they

involve a defendant, who happened to be a gang member, acting alone. (See *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199; *In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1361–1364; *People v. Ochoa* (2009) 179 Cal.App.4th 650, 662-663.) Further, prominently advertising the name of the gang when committing crimes is one way of promoting the gang but is not required to meet the elements of the allegation. Comparisons between cases have little value when they present different facts. (*People v. Rundle* (2008) 43 Cal.4th 76, 137–138, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421 (*Doolin*).)

2. *Admission of Gang Rap Video Was Erroneous but Harmless*

Taylor contends that the trial court erred in admitting a two-minute gang rap video, arguing that it was inflammatory, and that the trial court abused its discretion when it ruled the video admissible. We agree that the video should not have been admitted but conclude that the error was harmless.

Officers found a two-minute gang rap video that was published on a popular website — YouTube — about seven months after this crime. Taylor and other members of P-Loc were in the video and it was filmed in P-Loc territory, but these facts were not advertised and would not be known by the viewer unless the viewer had pre-existing knowledge of P-Loc members and territory. Taylor was in the background of three scenes: in front of an apartment house with several P-Loc members; smoking marijuana in a car; and in the background as other gang members were showing off the accoutrements of drug sales — small bindles, marijuana, lots of cash, and firearms with unlawful magazines. The participants in the video identified themselves as members of a

rap group called "Real Nigga Shit." The rapper on the video said, "P-Locs die, man. This is a Real Nigga Shit video." The video does not reflect on the P-Loc gang, as P-Loc is mentioned only to disclaim it.

The court reviewed the video and evaluated it under Evidence Code section 352, balancing probative value and prejudicial effect. Defense counsel identified the video as belonging to the genre of gangster rap, within popular culture. The court acknowledged the genre and said, on the one hand, some people are inflamed and offended by gangster rap,[6] and the evidence was cumulative to other evidence on Taylor's association with gang members. On the other hand, it was short and not likely to confuse the jury. Overall, the trial court found there was some prejudicial effect, but that it was outweighed by the video's probative value on the gang enhancements and substantive crime of participation in felonious gang activity.

The trial court has broad discretion to determine whether evidence is relevant, and whether the evidence should be excluded under Evidence Code section 352. Prejudice in this context does not mean evidence that is damaging to the defense case, but rather arises from evidence that uniquely tends to evoke an emotional bias against the defendant or cause prejudgment of the issues based on extraneous factors. (*Doolin*, *supra*, 45 Cal.4th at pp. 438–439.) Although the court has broad discretion, some gang evidence " 'may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt.' " (*People v. Pettie* (2017)

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6 The word "nigga" is used continually throughout the video, along with other profane and offensive words such as a reference to "ho's."

16 Cal.App.5th 23, 44 (*Pettie*), quoting *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Even when relevant, "the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224.)

Rap lyrics have been admitted when there was a strong connection between the defendant and the lyrics or video, such as when the defendant was the composer. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372 (*Olguin*) [handwritten lyrics referred to composer by the defendant's gang moniker]; *People v. Zepeda* (2008) 167 Cal.App.4th 25, 32–33 (*Zepeda*) [defendant's picture was on inside cover of CD and defendant was credited as author of the songs played at trial].) There was no evidence here that Taylor was involved in the creation, production or distribution of the video in any way other than appearing in the background for a few seconds. He did not "rap" or speak during the video. It was not found in Taylor's possession. It was on an open, popular website. Investigator Leone testified he did not consider Taylor's smoking of marijuana in the video as relevant to his possession of marijuana for sale because so many people use marijuana. The participants were not clearly identifiable as P-Loc members and Taylor had no particular connection to the video, unlike the circumstances in *Olguin* and in *Zepeda*.

We conclude the relevance of the video was minimal due to Taylor's minimal participation and the lack of P-Loc identification. To the extent it had any tendency to prove Taylor's connection to P-Loc and to drug sales, it was cumulative. The genre in

general, and this video in particular, are inflammatory and offensive to some lay people. Taylor's participation, though minimal, could evoke an emotional bias against him.

Although the video should have been excluded, its admission was harmless under both the state and federal standards. The evidence found when Taylor was stopped overwhelmingly showed that he was selling drugs in association with a gang and was actively participating in felonious conduct with gang members. Admission of the video did not make Taylor's trial fundamentally unfair, given the strength of the evidence of guilt. He would not have achieved a more favorable result if the video had not been admitted. (See *People v. Partida* (2005) 37 Cal.4th 428, 439; *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [federal violation if trial was fundamentally unfair]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state violation if reasonable likelihood of more favorable result without error].)

3. *Text Messages on Taylor's Cell Phone Were Properly Admitted*

Taylor contends that the warrantless search of his cell phone was unreasonable, and that the trial court erred in admitting the substance of text messages from his phone. We disagree. Under the totality of the circumstances, the officer's search of Taylor's phone was reasonable under the terms of Taylor's general permission-to-search condition of his probation.

a. *Proceedings at Trial*

Investigator Leone testified before the jury that he looked through three or four text messages on Taylor's phone because he knew from experience and training that it

was common for people who sell controlled substances to use their cell phones to arrange narcotic deals, usually by text message.

Defense counsel objected to the substance of the messages, and the trial court heard evidence and argument outside the presence of the jury. Investigator Leone said he was on the side of the road, at night. He took a quick look at the text messages on Taylor's phone, saw one regarding sales, and stopped. The court ruled that under the totality of the circumstances, the officer had the right to search the phone under Taylor's general probation search condition. The court also found that the text messages were in plain view, and the officer had reasonable cause to believe that the phone had incriminating information.

Back in front of the jury, Investigator Leone testified that text messages are a common method for conducting drug transactions. He already suspected narcotic sales due to the other information that he had. He looked at Taylor's phone and saw messages regarding a sale of the pills. This information was consistent with other evidence of drug sales that he had.

b. *Applicable Legal Standard for Motions to Suppress Evidence*

The Fourth Amendment of the federal Constitution prohibits unreasonable searches and seizures. " 'In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.' " (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1213 (*Macabeo*), quoting *Riley v. California* (2014) 573 U.S. 373, 382 (*Riley*).) The burden is on the People to establish that an exception applies by a preponderance of the evidence. (*Macabeo*, at p. 1213; *People v. Sandee* (2017) 15

Cal.App.5th 294, 299 (*Sandee*).) The exception applicable here is for the general search-waiver condition of probation. (*Sandee*, at p. 300.)

When considering a trial court's ruling on a motion to suppress, we defer to the trial court's factual findings, express and implied, that are supported by substantial evidence. We independently apply the law based on those facts. (*People v. Suff* (2014) 58 Cal.4th 1013, 1053.) We evaluate the scope of the defendant's Fourth Amendment waiver in a common-sense, reasonable and objective manner. (*People v. Bravo* (1987) 43 Cal.3d 600, 606; *Sandee*, *supra*, 15 Cal.App.5th at p. 301.) Because the claim arises under the federal Constitution, we review error under the federal standard of review, that is, whether the error in admitting unlawfully obtained evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Moore* (2011) 51 Cal.4th 1104, 1129.)

A motion to suppress evidence due to an illegal search should be brought before trial. (§ 1538.5, subds. (h) & (i); *People v. Frazier* (2005) 128 Cal.App.4th 807, 828.) The People argue that Taylor forfeited this claim by failing to bring the motion to suppress before trial. The People, however, failed to object to this procedural irregularity at trial and may not now object on that ground. A defendant may obtain review on appeal "provided that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence." (§ 1538.5, subd. (m).) The trial court heard and ruled on Taylor's motion and we proceed to review that ruling.

c. *The Search of Taylor's Cell Phone Was Within the Scope of the General Search Condition in His Probation Order*

In 2013, Taylor agreed to a general search term as a condition of his probation. The probation conditions contained no reference to electronic devices. This was a year before the court issued *Riley*, which prohibits a warrantless search of a cell phone incident to arrest. (*Riley*, *supra*, 573 U.S. at p. 403.) The *Riley* court characterized cell phones as having the capacity to hold " 'the privacies of life.' " (*Ibid*.) Before *Riley*, California had ruled that a warrantless search of a cell phone incident to arrest was legal. (*People v. Diaz* (2011) 51 Cal.4th 84, 98–99, & see 101, fn. 17 [cases that approved warrantless search of cell phone incident to arrest], abrogated by *Riley*, at pp. 401–403; see also *People v. Matthews* (2018) 21 Cal.App.5th 130, 138 [pre-*Riley* seizure of cell phone lawful under general probation search condition].)

The Court in *Riley* emphasized the heightened privacy interest in a cell phone was due to the amount and character of data contained in, or accessed through, a cell phone and the corresponding intrusiveness of a cell phone search. Here, Investigator Leone looked at only one thread of text messages. He did not examine the "broad array of private information" that can be found on a cell phone. (*Riley*, *supra*, 573 U.S. at p. 397.) The search was far more limited in scope than the search that was prohibited in *Riley*.

After *Riley*, searches of cell phones pursuant to Fourth Amendment waivers remained lawful. (*Sandee*, *supra*, 15 Cal.App.5th at p. 302.) In *Sandee*, the court upheld the search of a cell phone pursuant to a general probation search condition that was

conducted about a month after the search here. (*Id.* at pp. 298, 302.) The *Sandee* court reasoned, and we agree, that a reasonable, objective person at that time would have understood a general agreement to search a probationer's property to include a search of his cell phone. (*Id*. at pp. 301–302.) As our Supreme Court has explained, "We cannot expect police officers and probation agents who undertake searches pursuant to a search condition of a probation agreement to do more than give the condition the meaning that would appear to a reasonable, objective reader." (*People v. Bravo*, *supra*, 43 Cal.3d at p. 606.) Law enforcement officers should not be expected to "analyze the [search] condition in light of legal precedent drawing fine points based on minor differences in the wording of search conditions in other probation orders." (*Id.* at pp. 606–607; see also *Sandee*, at p. 301.) A reasonable person would conclude, objectively, that a general search condition permitting searches of personal property included a search of a cell phone.

This conclusion is reinforced by California's enactment of the Electronic Communications Privacy Act (ECPA) (§ 1546 et seq.), effective January 1, 2016. The ECPA prohibits a governmental search of a cell phone except in specified exceptions, including specific consent by the authorized possessor. (§ 1546.1, subds. (a)(3), (c)(3).) The ECPA was further amended as of January 1, 2017, specifying that searches were permissible if the "authorized possessor of the device . . . is *subject to an electronic device search as a clear and unambiguous condition of probation* . . . ." (§ 1546.1, subd. (c)(10), emphasis added.) These changes would not have been necessary if the general search condition had not been objectively understood to include cell phones. Thus, in the

case of *In re I.V.* (2017) 11 Cal.App.5th 249, 262, the court relied in part on the ECPA's limitation on access to electronic device information in concluding that a 2016 general probation search condition did not apply to a cell phone. (*Id.* at p. 262, & fn. 16.) Taylor agreed to the general search probation condition in 2013, and the officer interpreted that condition in 2015, before enactment of the ECPA. *In re I.V.* is not applicable. (See *Sandee*, *supra*, 15 Cal.App.5th at p. 306.)

The ECPA is not retroactive pursuant to *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), as Taylor claims. *Estrada* applies only in the specific context of legislative mitigation of the penalty for a specific crime. (*People v. Brown* (2012) 54 Cal.4th 314, 325.) The ECPA does not mitigate the penalty for a specific crime. (*Sandee*, *supra*, 15 Cal.App.5th at p. 305, fn. 7; *Brown*, at p. 325 [statute applicable to all cases does not reflect legislative evaluation of particular crime].)

Further, the Ninth Circuit decision in *United States v. Lara* (9th Cir. 2016) 815 F.3d 605 is neither applicable nor persuasive here. The *Lara* court relied on a Supreme Court opinion that ruled a search based on reasonable suspicion was valid because the legitimate governmental interest in crime prevention outweighed a probationer's "significantly diminished privacy interests." (*United States v. Knights* (2001) 534 U.S.

112, 121 (*Knights*),[7] cited in *Lara*, at p. 610.) The search in *Lara* was found to be unreasonable because there was no suspicion of criminal activity in *Lara*. (*Lara*, at p. 612.) This case is similar to *Knights*, where reasonable suspicion of criminal activity made the search reasonable. Investigator Leone's strong suspicion that Taylor was engaged in criminal activity outweighed Taylor's significantly diminished privacy interest, especially because the privacy intrusion was minimal.

We conclude that Investigator Leone acted reasonably in his limited search of text messages on Taylor's phone, pursuant to Taylor's general waiver of his Fourth Amendment rights. In any event, admission of the text messages did not harm Taylor because the other evidence that indicated sales was substantial: the amount and type of pills, the amount of cash, the hiding of the pills in spots within Taylor's reach, especially the unusual location of the alprazolam pills, and his prior conviction for selling prescription drugs in association with his gang members. Beyond a reasonable doubt, any error in admitting the text messages did not contribute to the verdict obtained. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

4. *There Was No Conviction on Taylor's Prior Serious Felony and Strike Conviction*

The trial court sentenced Taylor as a second-striker based on a prior serious or violent felony conviction and added a term of five years for a prior serious felony

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7 We do not hold or imply that the federal balancing test is applicable in California. The *Knights* court expressly stated that it was not deciding the validity of California's consent-based approach, finding the search at issue to be valid under the alternative balancing approach. (*Knights*, *supra*, 534 U.S. at p. 118, citing *People v. Woods* (1999) 21 Cal.4th 668.) California's consent-based approach continues to control this issue. (*Sandee*, *supra*, 15 Cal.App.5th at p. 303, fn. 6.)

conviction.[8] (§§ 667, subds. (c) & (e), 1170.12; 667, subd. (a).) We asked the parties to file supplemental briefs discussing whether a prior serious or violent felony conviction was either alleged or proved, and if so, if Taylor's admission was voluntary and knowing, and if not, whether the conviction could be retried.

a. *There is No Evidence that Taylor Admitted the Prior Conviction*

The first amended information alleged one prior conviction as both a prior serious felony (§ 667, subd. (a)) and also as a prior strike (§ 667, subd. (c) & (e)(1), 1170.12, subd. (c)(1)). The prior conviction that was alleged, however, was not a felony offense but a gang sentencing enhancement. (§ 186.22, subd. (b)(1)(A).)

The amended information separately alleged, in connection with counts 1 and 2, sale of controlled substances, that Taylor had a prior conviction for controlled substance sales (Health & Saf. Code, § 11351), such that probation was not permissible (Health & Saf. Code, § 11370).[9]

The prosecutor failed to submit verdict forms to the jury on the prior drug conviction in connection with counts 1 and 2, so there was no finding on the 2014 prior

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8 The trial court imposed the five-year enhancement for a prior serious felony conviction, but this term was not included in the court minutes or on the abstract of judgment. The oral judgment prevails. (*In re Z.G.* (2016) 5 Cal.App.5th 705, 719; *In re Merrick V.* (2004) 122 Cal.App.4th 235, 249 [reporter's transcript controls over clerk's transcript].)

9 Apparently, the prosecutor intended to allege the three-year enhancement when a defendant has a prior drug conviction, not the no-probation condition. He stated at sentencing that there was a "three-year sales prior." But that three-year drug recidivist enhancement (Health & Saf. Code, § 11370.2) was not alleged in the information. The amended information alleged Health and Safety Code section 11370, which prohibits probation for drug offenders who had prior drug convictions.

felony offense of possession of a controlled substance for sale. Nor did Taylor admit that he had a prior conviction for purposes of the strike and prior serious felony sentencing enhancements. The reporter's transcript contains no admission of the prior conviction. The clerk's transcript states that Taylor admitted the prior conviction during his sentencing hearing, but the reporter's transcript contains no such admission. We reconcile this difference in favor of the reporter's transcript as no circumstances suggest a full, advised admission. (*In re Z.G., supra*, 5 Cal.App.5th at p. 719; *In re Merrick V., supra*, 122 Cal.App.4th at p. 249.) Taylor waived his right to a jury trial on the prior conviction, but he never waived or was advised of the constitutional rights he was waiving when admitting a prior conviction. (*People v. Farwell* (2018) 5 Cal.5th 295, 300 [advisement of rights necessary for admission of prior conviction].)

b. *The Prior Serious Felony Conviction Was Improperly Alleged but Taylor Forfeited any Objection to the Form of the Allegation*

As stated, a gang enhancement was alleged as the prior serious felony conviction, but no underlying felony offense was alleged. The pleading was incorrect, but Taylor forfeited any error by failing to object in the trial court.

A prior serious felony conviction is necessary for both the five-year enhancement and the strike enhancement. Serious felonies are defined in section 1192.7, subdivision (c) and include, "any *felony offense*, which would also constitute a felony violation of Section 186.22." (§ 1192.7, subd. (c)(28), emphasis added.) Section 186.22, subdivision (b)(1) by itself does not qualify as a serious felony because it states a sentence

enhancement, not a felony offense. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 898 (*Robert L.*).) An offense defines or sets forth elements of a separate crime. (*Id*. at p. 899.) The gang enhancement, alone, is not a serious felony under section 1192.7, subd. (c).

Taylor, however, failed to object to the form of the allegation both below and in this appeal. He states on appeal that the gang enhancement allegation "was attached to a violation of Health and Safety Code section 11351, possession of hydrocodone pills for sale," citing to the first amended information and the probation report. He further acknowledges that he pleaded guilty to that offense and admitted the gang enhancement, as shown in the probation report.

Taylor had actual notice of the underlying felony offense. It was alleged in the amended information in conjunction with counts 1 and 2; there was testimony at the preliminary hearing and at trial that Taylor pleaded guilty to that felony and the gang enhancement; the prior felony and enhancement were identified as one of the predicate crimes committed by P-Loc members; and at sentencing Taylor referred to his "case" from 2013. Under the circumstances of this case, we conclude that Taylor had actual notice of the felony underlying his prior conviction and he forfeited any objection to formal notice within the amended information. (See *People v. Goolsby* (2015) 62 Cal.4th 360, 367 [defendant forfeits claim of lack of notice in information by failing to object].)

c. *The Prior Conviction May Be Retried on Remand*

We vacate Taylor's sentence because it was based on the recidivist enhancements and there was no finding or admission on the truth of the prior serious felony and strike

conviction. These may be retried on remand. Neither the due process clause nor the double jeopardy clause bar a retrial in noncapital cases on sentencing enhancements when the evidence was insufficient to support the enhancement findings. (See *People v. Barragan* (2004) 32 Cal.4th 236, 240–245; *Monge v. California* (1998) 524 U.S. 721, 734; *People v. Monge* (1997) 16 Cal.4th 826, 842–845.) This principle applies with equal force in this situation, where the record does not show an admission or true finding on the allegations.

If the prior serious felony conviction is admitted or found true on remand, the trial court may exercise its discretion to dismiss, strike or strike the punishment for the prior serious felony conviction under sections 667, subdivision (a) and 1385. We conclude that the recent amendments to those statutes are applicable to this case under *In re Estrada, supra,* 63 Cal.2d at pp. 744–745 [absent evidence of contrary legislative intent, " 'it is an inevitable inference' " that the Legislature intends ameliorative criminal statutes to apply to all cases not final when the statutes become effective], as applied in *People v. Garcia* (2018) 28 Cal.App.5th 961, 972–973.

5. *The Trial Court Must Correct Its Sentence on Count 2, Possession of Alprazolam for Sale*

The trial court sentenced Taylor on count 2, possession of alprazolam for sale, to two years, or twice the purported midterm of one year. Taylor contends that this sentence was incorrect and the People agree. After review, we accept the People's concession and direct the trial court to correct the sentence on count 2 on remand.

The sentence for violation of Health & Safety Code section 11375, subdivision (b)(1), count 2, is one year in county jail or imprisonment in state prison. (Health & Saf. Code, § 11375, subd. (b)(1).) When the felony term is not specified in the underlying statute, the prison sentence is for sixteen months, two years or three years. (§ 1170, subd. (h)(1).)

The trial court chose count 1 as the primary count and imposed a consecutive, subordinate term on count 2. A consecutive subordinate term is one-third the middle term of two years, or eight months, doubled to 16 months. The trial court erred when it imposed a sentence of two years and is directed to correct this on remand.

6. *The Trial Court Must Resentence Taylor on Count 3 Because It Was Unaware of its Discretion to Sentence Taylor to Either a Felony or a Misdemeanor*

We directed the parties to file supplemental briefs on the propriety of the sentence on count 3, possession of marijuana for sale for the benefit of or in association with a criminal street gang. (Health & Saf. Code, § 11359; Pen. Code, § 186.22, subd. (d).)

At sentencing, the prosecutor told the trial court that the gang enhancement to count 3 turned possession of marijuana for sale into "a one-year, two-year, or three-year felony." The trial court imposed one-third of the middle term, eight months, doubled to one year four months pursuant to the prior strike conviction.

Possession of marijuana for sale was a felony for all purposes when Taylor committed the crime in August 2015. (Health & Saf. Code, § 11359.) The passage of Proposition 64 in November 2016, legalizing the use of recreational marijuana, made sale of marijuana a misdemeanor for all purposes. (Health & Saf. Code, § 11359, subd. (b).)

A gang enhancement under section 186.22, subdivision (d) was found true. That subdivision provides an alternative punishment provision that elevates a straight misdemeanor like possession of marijuana for sale to a wobbler, punishable either as a misdemeanor or as a felony. (§ 186.22, subd, (d); *Robert L., supra*, 30 Cal.4th at pp. 906–907; *People v. Sweeney* (2016) 4 Cal.App.5th 295, 301.)

The parties agree. The record shows that the trial court was not aware that it had the discretion to impose a misdemeanor sentence on count 3. It repeatedly stated its intention to sentence Taylor to the lowest sentence possible. Defendants are entitled to be sentenced by courts that are aware of the scope of their discretion. A sentence that is imposed by a court unaware of its sentencing discretion is not authorized and must be remanded for resentencing unless the record " 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware of its discretion.' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) Here, the prosecutor told the trial court that possession of marijuana for sale was a felony due to the gang enhancement, and Taylor did not correct the prosecutor. The record does not clearly indicate that the trial court would have imposed the same felony sentence if it had been aware of its discretion.

The People acknowledge that counsel was constitutionally ineffective for failing to object to the felony sentence on count 3 on the ground that the court was unaware of its discretion, and that the matter should be remanded for the trial court to exercise its discretion in sentencing Taylor on count 3 to either a misdemeanor or felony sentence.

We direct the trial court on remand to exercise its discretion with respect to count 3 to sentence Taylor on either the felony or misdemeanor sentence.

DISPOSITION

We vacate the sentence and remand to the trial court. On remand, the court may try Taylor on the prior serious felony and prior strike conviction or obtain an admission from him after he is advised of his rights. The court must then consider its discretion to impose or to strike the five-year prior serious felony enhancement. We direct the trial court upon resentencing to impose a sentence of eight months on count 2 and to exercise its discretion in determining whether to sentence Taylor on count 3 as either a felony or as a misdemeanor. We further direct the court to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation. In other respects, we affirm the judgment of conviction.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

GUERRERO, J.